No. 4312

In The United States
Circuit Court of Appeals
For the Ninth Circuit

GLEN FULKERSON,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Honorable Jeremiah Neterer, *Judge*

BRIEF OF GLEN FULKERSON
Plaintiff in Error

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STATEMENT OF THE CASE

Plaintiff in Error was informed against on the 20th day of September, 1923, for a violation of the National Prohibition Act, in three counts, namely, for the possession and sale of intoxicating liquor,

and maintaining and conducting a common nuisance, contrary to law To this, the plaintiff in error entered a plea of not guilty, and thereafter, on the 26th day of February, 1924, a trial was had in the District Court, which resulted in a verdict of guilty on all counts.

The plaintiff in error then filed a motion for new trial, which was overruled, and the plaintiff in error was sentenced to six months in jail on each of counts two and three of said Information,to run concurrently, and to pay a fine of $500. on Count I.

Plaintiff in error sued out his writ of error and now presents the same, upon the grounds of error preserved in the record.

The facts shown by the Bill are as follows: While a policeman of the City of Seattle, having been on the force for about three and one-half years, the plaintiff in error outside of his occupation as a patrolman, was working as a doorman at the Hippodrome, and had been so employed for some time last pass. He worked from 8:30 until one or 1:15 o'clock in the evening for the Hippodrome; was employed as a policeman by the City from the hours of 12 noon until 8 o'clock in the evening; that he rented a room at the premises described at 515 Seneca Street, being one of the rooms in the Apartment subject to this controversy; that he had his room for the same period of time that he had been a doorman at the Hippodrome, about three

months, having rented the room from Mrs. Nulph, a co-defendant in the case, and paid her $15.00 a month for the same; that on the first of September, 1923, his beat was changed to Washington Street, and he started working nights, instead of days, and that he had given up the room, but had not had an opportunity to take his things away, and he came to the premises on the 10th day of September, 1923, the day he was arrested, for the purpose of getting his clothes, because he had maintained the room and changed there when he went off duty as a patrolman, to his uniform as a doorman at the Hippodrome. He left his wife and his brother and sister in the car outside the building waiting for him, while he went in to get his things. The officer contended they bought some drinks from one Ruth Miller, a co-defendant, and that she had a flask of whiskey in a pocket of her dress. They asked her how much it would be for the bottle, and she said they were $5.00. One of the agents then said that he offered to give her $5.00 for the two drinks that they had had, and what was left in the bottle, and she went outside the door and after a few minutes the defendant, Fulkerson, came in and said it was all right for the $5.00 and passed the bottle to the Prohibition Agents, and received the $5.00 in payment. Fulkerson testified that he had never seen the Miller woman before, and did not have any interest in the whiskey, and did not have anything to do with it. (Tr. pp. 29-43.)

ASSIGNMENTS OF ERROR

I

The plaintiff in error, in connection with his petition for writ of error, makes the following assignments of error, which he avers occurred upon the trial of the case, to-wit:

1. The lower court erred in denying the defendant's motion for new trial, particularly upon the ground that the defendant, Glen Fulkerson, was precluded from having a fair and impartial trial by reason of the comments of the trial judge on the evidence adversely to the said defendant, and prejudicial.

2. The court erred in its instructions to the jury, as follows:

> "If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him, with that color of contents,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead law and the Prohibition amendment, then you must conclude that way, because it is for you to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. I don't believe a word of it, myself; I believe he knew what was in the bottle."

> "*When courts cease to function properly, then God have mercy upon the people of the United States. Law is a rule of civil conduct prescribed by a superior power, and persons must regulate their conduct with relation to that law. It is a rule by which people shall live, and*

when they violate that rule why then they must be punished; that is the only way we can have government: and when courts and juries won't function, it will only be a short step to a condition of anarchy.

"If you believe that the defendant went on the stand and perjured himself with a view of escaping a penalty, you will so conclude. . . . If you are convinced beyond a reasonable doubt, then return a verdict of guilty in this case, as your conscience dictates, and the right and truth is."

MR. TUCKER: I want to take an exception, Your Honor, to that portion of Your Honor's instructions to the jury wherein, commenting upon the evidence of the defendant, you said you did not believe it. I take an exception to it as being an infringement upon the rights of the defendant to have his case tried by a jury and to pass upon the facts.

THE COURT: Exception noted.

MR. TUCKER: I further take an exception to it upon the ground it is not your province to express your opinion as to what you believe about the evidence to the jury.

THE COURT: Yes, let the exception be noted (Tr. pp. 47-50).

MR. TUCKER: I also take exception to that portion of your Honor's instructions to the jury wherein you dilated upon the necessity for the enforcement of the criminal law, and the necessity for

the punishment of those charged with crime, who might be convicted.

THE COURT: Yes, note that exception

MR. TUCKER: As being an infringement upon the right of the defendant to have a fair trial by a jury.

THE COURT: Yes, let the exceptions be noted. (Tr. pp. 51-52).

ARGUMENT

The assignments present these questions:

1. Was the defendant precluded from having a fair and impartial trial, by reason of the comments of the trial judge on the evidence adversely to the said defendant and prejudicial to him?

2. Did the court in threatening the jury with the result of a verdict of not guilty, invade the province of the jury, and so prejudice the jury against the defendant as to not afford him a fair trial, when the matters in comment had nothing whatsoever to do with the issues, or applicable to the case at bar?

POINT I

Under this caption, we will discuss these two questions.

The entire instruction of the court did not deal with any fact that was favorable to the defendant,

but only with those facts that were adverse to him. The defendant's explanation as to his presence in the premises, which was perfectly lawful, was not even suggested to the jury in his argument to them, but instead, the court, whose duty it was to instruct the jury on the law, expressed continuously throughout his instructions, his opinion of the defendant's guilt, and made to the jury, by an elimination of the good, and the expounding of the bad, what could only conclusively establish the guilt of the defendant. The court said, in remarking upon whether the defendant knew what was in the bottle:

> "If you believe that a man could be on the police force in Seattle for three years and have a flask like that passed to him, with that color of contents,—a man on the police force, and not knowing it was whiskey or prohibited spirits provided by the Volstead law and the Prohibition amendment, then you must conclude that way, because it is for you to determine what the fact is. Now, I don't want you to conclude from any opinion you may think I have of the facts. *I don't believe a word of it myself; I believe he knew what was in the bottle.* . ." (Tr. pp. 47-48).

And the court, continuing:

> "I want you to conclude upon the evidence itself, so that the law may be administered fairly, if the law has been violated that it may be enforced, and the parties who violate it be punished. *When courts cease to function properly then God have mercy upon the people of the United States.* Law is a rule of civil conduct prescribed by a superior power, and persons must regulate their con-

duct with relation to that law. It is a rule by which people shall live, and when they violate that rule why then they must be punished; that is the only way we can have government; and when courts and juries won't function, it will only be a short step to a condition of anarchy.

, "If you believe that the defendant went on the stand and perjured himself with a view of escaping a penalty, you will so conclude. Pass upon this fairly. . . ." (Tr. p. 49).

The court continuing:

'If you are convinced beyond a reasonable doubt, then return a verdict of guilty in this case, as your conscience dictates, *and the right and truth is*." (Tr. p. 50).

The jury promptly returned a verdict of guilty on all counts, which after this charge, was all that they could be expected to do. There was no weighing of the evidence. The court had painted a picture so black, that the jury had a right to believe as the court said, that "it was only a short step to a condition of anarchy" if they did not properly function, and he had told them how to function. The weight the jury gives to what the court says, we all appreciate. It should be so. The Court, a man of learning, and experience, educated in the law, the jurors lean with great weight on his very syllable, but there was no question in this case of the courts ceasing to function or reason for God to have mercy upon the people of the United States, and it was prejudicial to the defendant for the Court to state that it was only a "short step to a

condition of anarchy" when the courts and juries cease to function, and that "law is a rule of civil conduct prescribed by a superior power, and persons must regulate their conduct with relation to that law. It is a rule by which people shall live, and when they violate that rule, why then they must be punished; that is the only way we can have government."

Under these circumstances, were the rights of the defendant infringed, to have the case tried by a jury, who were to pass on the facts? Could the Court, by anything he said regarding the province of the jury as being sole judges of the facts, have cured the influence he had wielded by the force of his charge?

In the State Court of this Circuit the rule prevails that the court cannot express an opinion, and under these circumstances an expression of an opinion from a Federal Judge in this Circuit, necessarily carries more weight than would an expression of a Federal Judge in a circuit where a different rule prevails in the State Court. If the layman sits upon the jury, not educated in the law, relying upon the court to instruct him as to the law, prejudiced against the defendant by the charge of the court as to the consequences of his duty to function as a juror, being only a short step to a condition of anarchy, and that when "courts cease to function properly then God have mercy upon the people of the United States," in conjunction with the expresison of the court that he did not believe

a word of it, referring to the testimony of the defendant, in connection with the charge of the court that 'if you are convinced beyond a reasonable doubt, then return a verdict of guilty in this case, *as your conscience dictates, and the right and truth is,*" there could be but one impression that the jury could get from the charge of the court, and that is that the jury would cease to function if they did not find the defendant guilty, and believing the court that they must find him guilty, there was nothing else for the jury to do under these instructions. The court took away from the jury their right to function by his comments not only upon the guilt of the defendant, but the consequences of their verdict. There was nothing he could then say about the jury being the sole judges of the facts, which would cure what he had already said as to how they should conclude these facts. This precluded the defendant from having a fair and impartial trial, and no where in the authorities have we found a charge that so completely invades the province of the jury.

If the jury in this case were twelve fair and impartial men, there is but one conclusion at which they could arrive after listening to this charge, and that is the guilt of the defendant. The court, without making a fair statement of the evidence, or any statement of the defendant's defense, remarks only upon that evidence that could be adverse to him, emphasizing it to the jury with his comment as to his conclusion as to the guilt of the defendant, and

the consequences of their act if they cease to function, which precluded entirely a fair and impartial trial, and prevented the jury from properly functioning, and was greatly prejudicial to the defendant.

The following cases indicate how far the courts have gone in the matter of commenting upon the facts:

Mullen vs. U. S., 106 Fed. 892.
Rudd vs. U. S., 173 Fed. 912.
Foster vs. U. S., 188 Fed. 308.
Oppenheim vs. U. S., 241 Fed. 625.
Hicks vs. U. S., 150 U. S. 442 (450).
Sparf vs. U. S., 156 U. S., 51.
Allison vs. U. S., 160 U. S. 203.
Starr vs. U. S., 153 U. S. 614 (624).
Graham vs. U. S. 251 U. S. 474.
Smith vs. U. S. 161 U. S. 85.

In *Mullen vs. U. S.*, 106 Federal 892, the Court quotes with approval, from *Starr vs. U. S.*, 153 U. S. 616, referring to the language of the Supreme Court of Pennsylvania in *Burke vs. Maxwell*, Adm., 81 Pa. St. 153, as follows:

> "When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it clearly and impartially. And, if the expression of an opinion upon such evidence becomes a matter of duty under the circumstance of the particular case great care

should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately as well that which makes in favor of a party as that which makes against him. Deductions and theories not warranted by the evidence should be studiously avoided. They can hardly fail to mislead the jury and work injustice."

The Chief Justice adds:

> "It is obvious that under any system of jury trials the influence of the trial judge upon the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Hicks vs. U. S.*, 150 U. S. 442.

The indignation of the learned trial judge in this case was perhaps provoked by the defendant being a police officer, but the comments were unwarranted and prejudicial to the accused in a high degree. *Rudd vs. U. S.*, 173 Fed. 912.

The court said the view was undoubtedly impressed upon the jury that "no one with the slightest degree of intelligence above insanity could believe the machine was practicable." The court then remarked that "Whether conduct which is the subject of a criminal charge results from a credulous self-deception, or, on the other hand, evinces a design to defraud the public, is a question for the determination of the jury, and it is none the less so, though the truth of the matter may be clear to most intelligent minds. The remarks of

the court were calculated to impose upon them a constraint that interfered with an independent consideration of his defense."

Quoting with approval Chief Justice Fuller, in *Starr vs. United States*, 153 U. S. 614, the court continued:

> "True the court afterwards withdrew the language and said it was a question for the jury; but it is doubtful the damage was repaired, and when that is the case the just remedy is a new trial. A mere withdrawal of words, and a direction to the jury that the question is for them, is not always sufficient. The effect of what is said may remain. . . . But his comments upon the facts should be judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment."

But the Court here left no room for doubt in the minds of the jury, in dissuading them from considering the testimony and lending such weight to it as it was entitled, but by his comment upon the guilt of the defendant, with the consequence of a contrary verdict, left no room for the exercise of any judgment on the part of the jury.

Listening to the court's charge, independent of the record of the testimony, there could be but a conclusion of guilt of the defendant to which a fair-minded jury could come.

In *Foster vs. U. S.*, 188 Fed. 308, the court said:

"It should be borne in mind that the judges of the various state courts in this circuit are not permitted to express an opinion as to the guilt of a defendant. Our people have become accustomed to this system, and as a consequence, jurors attach great importance to any expression coming from the presiding judge, feeling as they do, that it is only in exceptional cases that he expresses an opinion as to any matter that may be submitted to them, and when he does they feel that they are bound by the same. Under these circumstances, an expression of opinion from a federal judge in this circuit necessarily carries more weight than would the opinion of a federal judge in a circuit where a different rule prevails in the State Courts. While the learned judge who heard this case below, employed language that clearly informed the jury that they were not bound by any expression that he may have made, nevertheless, the circumstances surrounding the trial of this case are such as to impel us to the conclusion that the jury was influenced in a large measure by the opinion of the court. It may be that in many instances jurors refuse to find the defendants guilty, notwithstanding the fact that the evidence is such as to justify them in so doing, and thus permit those who are guilty to escape punishment. While this is to be deplored, yet the rule which leaves all questions of fact to be passed upon by the jury, should never be relaxed or modified, if the rights and liberties of the citizen are to be preserved."

In Oppenheim vs U. S., 241 Fed. 625, "the defendants urge that the charge of the Court was so one sided as to amount to a summing up on behalf of the government. Examination of the charge

constrains us to find that this criticism is just. Although no objection or exception was taken to it, we may consider it as a plain error under Rule 11 of this Court. The words of the judge's charge are the last words and the most weighty words that are dropped into the minds of the jury before they come to their verdict, and it is of the utmost importance that they be calm and impartial."

The proposition that the wise and human provision of the law that a person accused is a competent witness, should not be defeated by hostile intimations of the trial judge, is reiterated by the opinion of Chief Justice Fuller, in *Allison vs. U. S.,* 160, U. S. 203; *Smith vs. U. S.,* 161 U. S., 85 and *Starr vs. U. S.,* 153 U. S. 614 (624).

The court came to the same conclusion as to the rights of the defendant having been invaded and the jury persuaded by the comments of the trial court, both decisions being in point.

The virtue of the instructions of the Court was at best a summing up for the government, of evidence adverse to the defendant, and coupled with his implication that he did not believe a word of it, referring to that part of the testimony of the defendant, with the emphasis the trial judge placed upon the consequences of the jury's verdict, left

to the jury but one course to pursue, or otherwise be subjected to ridicule.

The instructions were clearly prejudicial error, as laid down by the cases cited, anl it is upon this ground that the case should be reversed and returned for the manifestly prejudicial error of the record and the defendant afforded a trial by jury.

Respectfully submitted,

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